Sanctions
Abuse of Discretion

In re Porter — Bankr. No. 694-60095-psh13

8/4/95 BAP aff'g PSH Unpublished

The debtor was represented by attorney Eric Haws. On June 24, 1994 an order was filed which had been signed by Judge Higdon instructing Mr. Haws to present a proposed order of confirmation within 10 days. The order cautioned that the court would consider a reduction of the award of attorney fees if the documents were not timely filed. On September 7, the court sent a letter to Mr. Haws stating that his fee award would be reduced to zero for non-compliance with the June order and warning him that the case would be dismissed unless he presented the proposed order within five days. Mr. Haws did not respond and the case was dismissed. The debtor appealed the order of dismissal.

The BAP held that the bankruptcy court did not abuse its discretion in dismissing the case. Factors considered by the reviewing court in making is determination include 1) the plaintiff's diligence, 2) the trial court's need to manage its docket, 3) the danger of prejudice to the party suffering the delay, 4) the availability of other sanctions, and 5) the existence of a warning.

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NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

AUG 04 1995

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. OR-94-2234-VAsH
TERRY A. PORTER,	BK. No. 694-60095-psh13
Debtor.	
TERRY A. PORTER,	
Appellant,	
v.	**M E M O R A N D U M**
UNITED STATES TRUSTEE,	
Appellee.	

Submitted[1] on June 22, 1995
at Portland, Oregon

Filed - AUG - 4 1995

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Polly S. Higdon, Bankruptcy Judge, Presiding

Before: VOLINN, ASHLAND, and HAGAN, Bankruptcy Judges.

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[1]The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument.

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OVERVIEW

After reducing the debtor's attorney's fees to zero in an effort to enforce his compliance with its orders, the bankruptcy court dismissed this chapter 13 case as a sanction for failure to present an order confirming the plan. We AFFIRM.

FACTS AND PROCEEDINGS BELOW

The debtor, Terry A. Porter, is represented by attorney Eric Haws. Mr. Haws' letterhead lists offices in seven Oregon cities and towns and an additional nine phone numbers in other state-wide locations. According to the bankruptcy court, Haws has "practiced Chapter 13 for many years . . . ." In January 1994, Haws represented Porter when he filed a voluntary chapter 13 petition and a proposed chapter 13 plan.

In June 1994, Bankruptcy Judge Higdon signed an order styled "ORDER REQUIRING PRESENTATION OF PROPOSED CONFIRMATION/WAGE ORDER" ("the June order"). The order was filed on June 24, 1994, and the clerk of the court mailed copies of the order to "the debtor(s), debtor's attorney, if any, and trustee."

The order instructed Haws to present a proposed order of confirmation within 10 days.

The order cautioned that if the documents were not timely presented, "the court will consider a reduction of the attorney

fees for the debtor's attorney."[2]

The order further stated that in future cases the attorney would be required to file proposed confirmation orders not later than two business days prior to the confirmation hearing, or to tender them at the confirmation hearing.

On September 7, 1994, the court sent a letter to Haws, with a copy to Porter (the September letter), stating that the court was reducing Haws' fee to zero for non-compliance with the June order and warning him that it would dismiss the case unless he presented the proposed order within five days.

Apparently Haws did not respond. By order entered September 13, 1994, the court dismissed the case for failure to comply with the June order.

Porter appealed on September 23.[3]

STANDARD OF REVIEW

Orders of dismissal are reviewed for an abuse of discretion. In re Hill, 775 F.2d 1385, 1386 (9th Cir. 1985); In re Loya, 123 B.R. 338, 340 (9th Cir. BAP 1991).

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[2]In a proposed order confirming the chapter 13 plan, provided in appellant's excerpts of record with this appeal, Haws asked for $1,200. This order is not file-stamped, and apparently has never been presented.

[3]By order entered October 20, 1994, the bankruptcy court denied a motion for stay of the order pending appeal. The order noted that Haws and Porter failed to appear at the scheduled hearing on the motion or offer any reason for their absence.

ISSUE PRESENTED

Whether the court abused its discretion by dismissing the debtor's case because his attorney failed to present a proposed order confirming the plan as ordered by the court.

DISCUSSION

In a one-page brief, Haws raises one procedural and one substantive argument.

Procedurally, Haws contends that dismissal was premature. He notes that under Fed.R.Civ.P. 6, intermediate weekends are not counted when computing time periods of less than 11 days (under the correlative bankruptcy rules, Fed.R.Bankr.P. 7006, 9006, the time period is eight days). Using this computation, Haws argues that his response period as indicated in the September letter -- "within five days of the date of this letter" -- did not expire until September 14. The dismissal order was entered on September 13.

The merit of this argument depends on characterization of the court's September letter. The rule refers to computation of time "prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . ." Fed.R.Bankr.P. 9006(a) (emphasis supplied). The closest category in the foregoing list for the September letter would be to consider it "an order of the court." Haws' procedural argument relies on this assumption, but he provides

no support for it.

We do not consider the September letter to be an order of the court, but rather, a warning of potential consequences which could be incurred for continued failure to obey a past order. The order which is the basis for the dismissal is the June order, entered some nine weeks prior to dismissal for failure to obey it. Therefore the rule of time computation does not apply to the warning, and, in any event, Haws does not contend that the timing of the dismissal constituted a surprise which deprived him of the opportunity to present the confirmation order.

The procedural leg of Haws' argument would have been sturdier had he alleged or provided evidence that he submitted the proposed order by or on September 14, and it was rejected. Because Haws does not contend that the timing of the dismissal deprived him of the opportunity to comply with the court's order, we conclude that the timing of the dismissal was harmless.

Haws' substantive argument is simply that the debtor should not be penalized for his attorney's failure because the debtor had no responsibility for the presentation of the order, and a less extreme sanction would have been proper.[4] We examine the merits of this contention.

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[4]Haws also contends that the failure to file the order did not constitute bad faith or fraudulent conduct on the part of the debtor, citing as authority, In re Ford, 78 B.R. 729 (Bankr. E.D. Penn. 1987). However, such were not the grounds for dismissal.

This case was dismissed essentially for failure to prosecute. In Tolbert v. Leighton, 623 F.2d 585 (9th Cir. 1980), the court held such dismissal to be an abuse of discretion where: 1) the only evidence of dilatoriness was failure to attend a pretrial conference, 2) no prior warning of the risk of dismissal was given by the court, and 3) the case was still "young." 623 F.2d at 586. Where one or more of these factors is present, the court considering dismissal must first consider less drastic sanctions. Id.

As the factors delineated in Tolbert are more or less present in this case, the court was required to consider less drastic sanctions prior to dismissal. The court did so. In the September letter, the court reduced Haws' attorney's fees to zero and warned him expressly of the possibility of dismissal. Despite this warning, Haws failed to comply with the order.

In determining whether the trial court committed an abuse of discretion by dismissing a suit, relevant factors to be considered by the reviewing court include: 1) the plaintiff's diligence, 2) the trial court's need to manage its docket, 3) the danger of prejudice to the party suffering the delay, 4) the availability of other sanctions, and 5) the existence of a warning. Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498, 499 (9th Cir. 1987).

In the instant case, the debtor's dilatory conduct was failure to present the proposed confirmation order. While the June order did not warn that failure to comply with it could

lead to dismissal, the September letter clearly warned that dismissal was at risk. While there does not appear to be any prejudice to an opposing party, the court's management of its docket has been affected insofar as the debtor's dilatoriness has required the court to issue an order and subsequently write a letter in the face of non-compliance.

The court's dismissal of this case appears to have been in some measure a reaction to a pattern of behavior by this debtor's attorney. As noted, in the September letter the court wrote to Haws, "[y]ou have practiced Chapter 13 for many years and have received many of these form orders." The court apparently found no excuse for Haws' failure to obey the June order. We conclude that adequate warning was given, and therefore, the court was within its discretion to dismiss the case.

We are not unmindful of Haws' argument that the debtor should not pay a penalty for misconduct by his attorney. Ordinarily, faults and defaults of an attorney are imputed to his client. In re Hill, 775 F.2d at 1387. In Hill, the district court dismissed an appeal because the trustee's attorney failed to timely file its appeal brief with the district court. Nevertheless, the court of appeals reversed the dismissal because the district court did not consider the severity of the effect of the sanction on the litigant.

In the case before us, however, such effect was considered and warning was clearly given. The debtor received copies of

the June order and of the September letter notifying him of his attorney's failure to comply with it and the potential consequences for continued failure. We can discern no lesser sanction which could have been employed by the court to enforce compliance with its order.

In view of the court's need to manage its docket, the debtor's attorney's apparent recurring recalcitrance in the face of orders of the court, and the debtor's potential recourse against his attorney for any damage caused by failure to comply with a simple order of the court, we cannot conclude that the court abused its discretion by dismissing this case.

CONCLUSION

Although appellant has given the panel very little help, dismissal is a harsh sanction and should only be invoked in extreme circumstances. In re Hill, 775 F.2d at 1387. Nevertheless, the court took action short of dismissal in an effort to enforce compliance, and such action was ignored. The order, therefore, is AFFIRMED.

OFFICE OF THE CLERK
United States Bankruptcy Appellate Panel
of the Ninth Circuit

NOTICE OF ENTRY OF JUDGMENT

A separate Judgment was entered in this case on 8/4/95 .

Motions for Rehearing

A motion for rehearing may be filed within 10 days after entry of the judgment. (Bankruptcy Rule 8015).

The motion shall be submitted on 8½ by 11 inch paper, shall not exceed 15 pages in length, and shall comply with rules governing service and signature. An original and three copies shall be filed.

A motion for rehearing may toll the time for filing a notice of appeal to the Court of Appeals. See Bankruptcy Rule 8015.

Bill of Costs

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rules of Appellate Procedure 39.

Issuance of the Mandate

The mandate, a certified copy of the judgment addressed to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 21 days after entry of the judgment unless otherwise ordered by the Panel. A timely motion for rehearing will stay issuance of the mandate until 7 days after disposition of the motion, unless otherwise ordered. See Bankruptcy Rule 8017 and Federal Rules of Appellate Procedure 41.

Appeal to Court of Appeals

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $100 filing fee. Checks may be made payable to the U.S. Court of Appeals For The Ninth Circuit. See Federal Rules of Appellate Procedure 4 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.